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No. 84-761

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DATA GENERAL CORPORATION,
Petitioner,

vs.

DIGIDYNE CORPORATION and FAIRCHILD CAMERA AND INSTRUMENT CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statement of Corporate Relationships

Digidyne Corporation is not owned by any parent corporation and does not have any affiliates.

Fairchild Camera and Instrument Corporation ("Fairchild") is a subsidiary of Schlumberger Technology Corporation, whose parent company is Schlumberger Limited. Fairchild has no subsidiaries, other than wholly-owned subsidiaries, and no affiliates.

Restatement of Question Presented

Petitioner's statement of the question presented does not arise from this case (adjudicating the legality of petitioner's tying arrangement under section 1 of the Sherman Antitrust Act and section 3 of the Clayton Act). It ignores the record and is premised on factual assertions that are contrary to the explicit findings of a unanimous jury as to petitioner's economic power. Indeed, in assuming that "the manufacturer lacks market power," petitioner totally begs the question resolved against it in the proceedings below.

The jury rendered a General Verdict finding that, during the period from 1977 to June 1981, petitioner "possessed sufficient economic power . . . appreciably to have restrained competition" [CR 3724] and answered nine Special Questions in respondents' favor [CR 3725]. In addition to explicit findings of defined markets and submarkets (defined by the criteria set forth in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962)) [CR 3725, Questions 1, 3, 4 and 5], the jury specifically found that, during the stated time period,

> "[petitioner] had the power to raise prices, or instead of raising prices, to impose burdensome terms that could not be obtained in a completely competitive market or submarket" [CR 3725, Ques. 7];
>
> "[petitioner's] operating system software was sufficiently unique that [petitioner] had some advantage not shared by its competitors within the appropriate operating system software market or submarket" [*id.*, Ques. 8]; and
>
> "there was an appreciable restraint within the tied product market or submarket" [*id.*, Ques. 9].

The court of appeals, reviewing the record and the district court's granting of judgment *n.o.v.* or a conditional new trial in light of *Jefferson Parish Hospital District No. 2*

v. Hyde, 104 S. Ct. 1551 (1984) (*"Jefferson Parish"*) (which was decided after the district court's decision), held that the jury's findings were amply supported by the record (which proved petitioner's economic power by multiple lines of proof) and, accordingly, that "[t]he district court erred in setting aside this verdict." [*Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1339 (9th Cir. 1984)]*

Thus, the only question that may be properly presented for review concerning the issue of economic power is whether the court of appeals correctly ruled that the jury could reasonably have found as it did on the record presented.**

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* The evidence was described by the court as "abundant," "substantial," "ample," "rich in testimony from customers" and "fully support[ing] the jury's verdict." [734 F.2d at 1341, 1342, 1346 n.6] In sum, the court stated: "In this case, the jury's verdict, rather than being clearly contrary to the weight of the evidence, was a more-than-defensible resolution of a difficult issue." [*Id.* at 1347]

The court of appeals also reviewed and affirmed the findings entered by the district court before the trial on cross-motions for summary judgment, under Fed. R. Civ. P. 56(d), that (1) petitioner's operating system software and its central processing units (CPUs) are separate products and that petitioner had tied the sale of its CPUs to its software licenses; (2) the tie affected a substantial amount of commerce; (3) respondents were damaged in fact by the tie-in; and (4) there are no "legitimate business considerations" for the tie. [734 F.2d at 1338-39 & n.1, *aff'g*, *In re Data General Corp. Antitrust Litigation*, 490 F. Supp. 1089 (N.D. Cal. 1980)]

The only issue referred to in petitioner's statement of the question presented is the issue resolved by the jury as to petitioner's economic power. Accordingly, respondents' restatement of the question presented is similarly confined to that issue.

** The standard of review of the judgment *n.o.v.* is whether, viewing the evidence and its inferences in the light most favorable to respondents, the jury could reasonably have found as it did. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1026 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982). The standard of review of the alternative new trial order is whether the verdict was against the great weight of the evidence or the jury clearly reached a seriously erroneous result. [See the cases cited by the court of appeals, 734 F.2d at 1347]

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Restatement of the Case

The Petition attempts to portray petitioner as like any manufacturer selling a product with some distinguishing features to the consumer public. That is not a fair representation of what the record shows.

Petitioner's minicomputer and microcomputer operating system software[1] was regarded both by petitioner and others as "the best in the industry and giv[ing] us a competitive edge over other suppliers." [Ex. 11; see 734 F.2d at 1341 & n.2] The court of appeals summarized the evidence in point as follows: "Experts, customers and even competitors testified to its many advantages over competitive products. [Petitioner's] own officials expressed the same opinion in pre-litigation documents." [734 F.2d at 1341][2]

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[1] To correct some of the misleading aspects of the explanation of operating system software in the Petition, there is submitted herewith in the Appendix hereto Exhibit 1749 in the record of this case, a Glossary which includes a definition of operating systems and other technical terms used by the witnesses in this case.

[2] Among other advantages, petitioner's operating system was (and was known as):

> the most comprehensive software available for any 16-bit minicomputer [Ex. 900] and providing "the industry's widest range of microcomputer system software" [RT 1976-77];
>
> the most compatible of all operating systems, "unparalleled in the computer industry" [Ex. 201 at 8] and "unmatched by [petitioner's] toughest competitors" [Ex. 442];
>
> the most field-proven and mature, providing it with an "'enormous advantage'" [RT 1794, 1728, 3691-92];
>
> having the most available application software for all operating systems which could run languages concurrently [RT 7337-39]; and

The bulk of petitioner's sales are not to consumers but to customers known as original equipment manufacturers ("OEMs") who design, assemble and sell various products utilizing computers [734 F.2d at 1342] (a fact which the Petition concedes [Pet. at 3], but then ignores [see, *e.g.*, Pet. at 13]). OEMs develop application software to perform the particular data processing tasks involved in their applications. The cost of such application software in some cases totals millions of dollars [*id.* at 1343] and, on a per system basis, often far exceeds the combined cost of all of the other components of the particular computer system [RT 2221-22].

Once induced to develop application programs to run with petitioner's operating system software the OEM may become absolutely dependent (in any practical sense) on the continued use of petitioner's operating system software for the continuation of his business. [See 734 F.2d at 1343][3] At least 80% of petitioner's several thousand customers have a sufficient investment in application programs written to run with petitioner's operating systems that they cannot, as a practical matter, timely convert their programs to use

having unique features making it superior to any other operating system for several applications [*e.g.*, RT 947, 1000, 1608, 3493-94].

The record also reveals the extent to which, at the time when petitioner was appealing to new customers, the software from the companies listed by petitioner as its major competitors [Pet. at 7 n.3] was considered to be deficient or was nonexistent. *E.g.*, "The [IBM] Series 1 . . . comes with practically no software, . . . it is mostly for process control . . . ." [Ex. OMX at IBM-8]

The facts of record, whether described herein in the past or present tense, generally refer to the period from 1977 to June 1981, the period encompassed in the jury's findings and verdict.

[3] Some of petitioner's software had "hooks" which were automatically incorporated into the OEMs' application programs, making it impossible for them to convert to the use of another operating system without substantially rewriting the application programs involved. [RT 1613-14, 7199] It "was common practice within [petitioner's] software development department to think about [and design] features which could lock people in." [RT 2576-77]

them with different operating systems. [RT 7191-92, 7194-95, 3026, 2471][4]

There can be no doubt that as to its captive OEM customers petitioner possessed a high degree of economic power by any standard. Petitioner's own economist witness admitted that:

> "'[I]n the short run, Data General can engage in practices with respect to some customers of raising price[s] significantly without eliminating all sales or perhaps even eliminating a large amount of sales.'"

[RT 6982]

Petitioner's conceded power over price was shown to be especially durable because of the long useful life of the OEMs' application programs. [RT 2446-47, 7195] The extent of petitioner's economic power was demonstrated by reference to petitioner's own pricing documents. [RT 3507-09, 3512-14] Explaining the significance of one of petitioner's pricing projections, Professor Richard Schmalensee, an expert economist witness, explained that the document showed that, even with respect to new business, petitioner has "a significant range of prices within which it can set the price without affecting sales revenue[s] seriously" — "a dramatic illustration of the presence of economic power . . . ." [RT 3509, 3513][5]

[4] Petitioner s salesmen and executives repeatedly observed and relied on the effect of "software lock-in" to combat competition from respondents and others. [See, *e.g.*, Ex. 45 ("software lock-in provided by RDOS Business Basic will be the key to making sure this customer stays with DG")]

[5] Additional examples of power over price proved from petitioner's own documents include a pricing recommendation which Professor Schmalensee explained provided the "clearest kind of recognition by Data General that its software provides it a substantial amount of economic power, discretionary power over price" [RT 3506-07] and a price estimate in another document showing that "[i]n technical terms, the elasticity of demand over the range [of estimates shown in the document] is about two" — manifesting "a great [degree of] monopoly power" [RT 3477, 3513].

The evidence also demonstrated that petitioner in fact had exploited its economic power to raise prices and impose burdensome terms on a substantial number of OEMs. In effect, petitioner sacrificed potential sales to new customers in order to obtain high profit margins on sales to its locked-in customers. [RT 3523][6] That pricing power and strategy are inferentially confirmed by the increase in the percentage of sales to old customers from 40% in 1972 and 32% in 1973 to more than 93% in 1979. [734 F.2d at 1343; see RT 3518-19; 3723-24] Ex. 3011f, set forth in the Appendix hereto, shows that dramatic increase.

Petitioner's power over price is also inferentially confirmed by the proof presented of the price discrimination practiced by petitioner against its locked-in customers.[7]

The most dramatic manifestation of petitioner's economic power was its adoption of a Minimum Equipment Configuration (MEC) requirement which Professor Schmalensee described as "a classic demonstration of power over price." [RT 3531] As explained in the opinion of the court of appeals [734 F.2d at 1433], as a condition of every software license petitioner requires that the licensee acquire from petitioner petitioner's designated MEC. The MEC includes

[6] Petitioner's president admitted that "'[p]art of the reason we do not have the dominant share of the market is that we are more profitable than most.'" [RT 4638] Petitioner's "historic level" of profitability [Ex. 117] gave it the second highest rate of income in the computer industry. [RT 4642] Its return on stockholders' equity of more than 20% placed it first in the computer industry and among the top 100 companies in all of American industry in the year 1976. [RT 4644]

[7] The evidence included proof that petitioner favored new customers over old customers in deliveries [RT 4144-45 ("[g]enerally, the priority list was, in my experience, in my area, always used for new customers")]; and proof that petitioner maintained high prices for old products primarily purchased by locked-in customers [RT 6894-95, 4646]. [*Cf.* RT 4501, 4469–70 (where petitioner admitted that it offered its products to some customers on terms not made available to others)]

not only a CPU of petitioner's manufacture but also a specified minimum amount of other hardware (peripheral devices) to be acquired only from petitioner or, alternatively, payment to petitioner of a charge — in addition to the substantial software license fee — called a Program License Charge ("PLC"). [RT 4500-01, 3694-97] The amount of the PLC is so high that it is viewed as a "fine." [RT 7440-41] The court of appeals noted that "[petitioner's] national accounts manager accurately referred to the charge as a 'penalty.'" [734 F.2d at 1343]

The amount of the PLC penalty for not purchasing some items from petitioner is more than the cost of the item itself. Consequently, petitioner's arbitrary MEC designations have required some customers to purchase items for which they had absolutely no use and which they immediately discarded or put in a corner to gather dust. [RT 1640-47, 821-23, 603, 605, 1828-30]

Moreover, the items which are manufactured by petitioner are frequently inferior in quality to the items of that type available from others.[8] Clearly, many of petitioner's customers, to avoid the PLC penalty, have purchased peripheral equipment which they would have preferred to purchase from others or not purchase at all. [See the testimony summarized by the court of appeals, 734 F.2d at 1343]

Authoritative evidence showed that it was entirely impractical for a competitor to produce software comparable to petitioner's system software on a timely basis. [Ex. 150; RT 2478; see 734 F.2d at 1342 n.3]

The evidence also showed that it was impossible for a competitor to timely create operating system software that could be substituted for petitioner's software ("compatible"

[8] RT 2899-900 (The Data General disc is "of inferior quality to the Diablo disc that we provided . . . with our systems prior to 1979" but "we are required under our agreement with Data General to use that disc if we're going to use RDOS"). [*Accord* RT 955-62, 1830-31, 1350-52, 7440-41]

software). At a minimum, as noted by the court of appeals (citing the testimony of one of petitioner's officers), "the passage of the time required to reproduce RDOS would render the completed software obsolete." [734 F.2d at 1342]

Furthermore, it was admitted that substitutable software could not be created without encountering petitioner's combined copyright and trade secret claims, which petitioner aggressively used (or misused) to augment and enhance its economic power. Particularly noteworthy are petitioner's claims of trade secret protection against all persons for every aspect of its software and every page of its widely distributed software manuals. The evidence is that such use of trade secret claims by petitioner has given petitioner a "meaningful competitive advantage" [RT 2191, 2226] which it has exploited "in order to protect its competitive position" [Ex. 136; RT 2224-25]. The court of appeals noted: "There is abundant evidence, including testimony of [petitioner's] own executives, customers, and [respondents'] expert witnesses, that [petitioner's] RDOS could not be reproduced without infringing [petitioner's] copyright and utilizing [petitioner's] trade secrets. [Petitioner] vigorously pursued those who assertedly violated [petitioner's] proprietary rights." [734 F.2d at 1342 (footnote omitted)]

The evidence also proved that petitioner adopted its tie-in arrangement for the explicit purpose of thwarting and suppressing the development of competition from other manufacturers of CPUs utilizing the NOVA instruction set (emulator products), at least some of which were superior to petitioner's CPU products. [RT 4382; *cf.* 734 F.2d at 1343] The arrangement was maintained with an appreciation by petitioner's executives that "[p]rotection from knock-off [emulator] products still lies in software licensing restrictions." [Ex. 78 at 5, quoted by the court of appeals, 734 F.2d at 1343][9]

[9] Petitioner denigrates the efforts and products of respondents and the other companies that have manufactured CPUs utilizing the NOVA instruction set (the original manufacturer plaintiffs in the action included, in addition to respondents, Ampex Corp., SCI Systems, Inc. and Bytronix Corp.) by contending that "they stole DG's trade secrets." [Pet. at 5] Since the Petition states that petitioner's allegation "plays no role in the litigation at this stage" [*id.*], respondents here note only that they individually have vigorously denied petitioner's canard.

The relevant record shows that respondents' hardware was innovative and superior to petitioner's. Fairchild's principal product was a microprocessor that was the first 16-bit microprocessor to operate at the speed of a minicomputer. Fairchild's microcomputer was superior to petitioner's product in general construction as well as design and speed. [RT 1628-30] Digidyne's CPU was built with advanced technology and materials which also made its product superior to petitioner's product. [RT 1500-02]

Finally, the Petition ignores the wealth of evidence presented at trial (which "'focused upon the definition of the relevant markets' for the two products . . . and consumed forty-five days" [734 F.2d at 1339]) and considered by the court of appeals concerning the product markets involved. (Instead, the Petition presents only the view of the district court that the jury's submarket findings must be rejected and the proof of economic power in a larger market disregarded because, in the larger market, petitioner had only 13.7% of the defined market.[10])

That market evidence included direct testimony as to the NOVA instruction set submarkets found by the jury from manufacturers of NOVA instruction set software [*e.g.*, RT 3901, 4163-64], manufacturers of NOVA instruction set CPUs [*e.g.*, RT 1803, 1373-74, 3972-73] and knowledgeable industry witnesses [*e.g.*, RT 3685, 7170], as well as confirmatory documentary evidence [*e.g.*, Ex. 5 (a competitive analysis by petitioner of competition in the NOVA instruc-

[10] The evidence as to the industry-wide market found by the jury showed that petitioner had the second largest share of that market and was one of "two major suppliers" of the "small business computer OEM market." [Ex. GJF] Petitioner and two other manufacturers enjoyed an installed base of 68.9% of all units sold to OEMs. Thus, the data indicated an oligopolistic market structure in which there is a "substantial probability of noncompetitive behavior." [RT 6871] Professor Schmalensee viewed the data as "absolutely not inconsistent" with his conclusion that petitioner had a significant degree of power over price and, indeed, itself suggestive of "at least . . . some power [over price]." [RT 3617]

tion set CPU market)] showing industry recognition of NOVA instruction set operating system software tying product and tied product markets.[11]

The evidence also included the testimony of OEM customers to the effect that they would not consider purchasing any product other than a NOVA-compatible product [*e.g.*, RT 7272-73; *cf.* 734 F.2d at 1342 n.4 (noting that "[petitioner's] former marketing manager could recall no instance in which an existing OEM customer had . . . switched to a new supplier")] There is no doubt that in the real world of competition competitors believed, and acted on the belief, that there was a clearly defined market in which competition was effectively confined to manufacturers of NOVA instruction set products. [*E.g.*, Ex. 1794 (August 1978 Marketing Plan of Educational Data Systems, at 19, 33 (showing competitors as essentially confined to manufacturers of NOVA instruction set CPUs)); RT 5197]

Professor Schmalensee explained that, since the "direct evidence" at trial was "more than sufficient to support the conclusion that Data General has power over price," it was unnecessary to define the market to conclude that petitioner had economic power, but that the market definitions found by the jury "fit the economi[c] realities in this case." [RT 3538-40] See also Schmalensee, *Another Look at Market Power,* 95 Harv. L. Rev. 1789, 1798-99 (1982). The court of appeals concluded from its review of the evidence: "The tie-in of RDOS to [petitioner's] NOVA instruction set CPU was [a] . . . conscious exercise of economic power in one market to gain an advantage in others." [734 F.2d at 1343][12]

The only basis for ignoring the evidence in the case which petitioner argued below was that the market should be viewed only before any OEM customers are locked-in

[11] One industry witness pointed out that "[t]hese tied and tying markets are so well recognized that they even have their own single-purpose, independently published newspaper . . . ." [RT 3685]

[12] There is no doubt that in the NOVA instruction set tying product submarket, judged by market share, petitioner's product is dominant. In the NOVA instruction set tying product submarket, it was estimated that petitioner possessed a 90% share. [RT 3904-05] Ex. 2040, a more

and as if every customer could choose freely among competing systems. The court of appeals held that "[t]his characterization of the market is not accurate," referring to evidence of confined OEM choices both before and after the initial choice of system software. [734 F.2d at 1342][13]

Thus, the Petition mischaracterizes the decision of the court of appeals as holding "that market power is irrelevant," "dispens[ing] with market analysis" and affirming the jury verdict merely "because RDOS is copyrighted and subject to trade secret claims and because many customers find RDOS especially attractive." [Pet. at 11, 12, 6] Manifestly the decision has a much broader base and focuses directly on market power in many ways. Although it presented only a "brief summary" of only a small portion of the evidence supporting the jury verdict, the court specifically noted:

> "Evidence regarding the potential sources of power with respect to RDOS (copyright, trade secret, and 'lock-in'), was submitted to the jury under appropriate instructions. The jury found as a fact that [petitioner] possessed and used the power by means of the tying arrangement to appreciably restrain competition in the market for NOVA instruction set CPUs. The evidence outlined above fully supported the jury's verdict."

[734 F.2d at 1344][14]

precise calculation based on software installed, calculates petitioner's share as 82.4%. In the NOVA instruction set tied product submarket, one competitor estimated that "'Data General "owns" about eighty-five percent of this market . . . .'" [RT 4036] Ex. 2041, a more precise calculation based on installed CPUs, calculates petitioner's share as 84.7%.

[13] Petitioner's theoretical argument also fails because it wrongly assumes that the initial selections of petitioner's software were informed choices. [See, *e.g.*, RT 1658: "If I had correctly perceived the effect of using RDOS, I never would have used it."]

[14] The proposed amicus curiae briefs similarly misjudge the opinion of the court of appeals as if it were entirely divorced from the record of the case. They also disregard (as does the Petition) the procedural context

Reasons for Denying the Petition
Summary of Argument

There is nothing remarkable about the decision of the court of appeals that the Petition criticizes. Rather, what is remarkable is the extent to which that decision is mischaracterized — and the facts of this case, and the jury findings, ignored or misstated — in the briefs supporting the Petition. What the court of appeals did was to correct the grievous error of the district court in substituting its own "findings" for the findings of the jury. The jury's verdict and particularized findings as to petitioner's economic power are well supported by a massive array of powerful evidence at least equal to that ever presented in any tying case. Based on that record, the decision of the court of appeals, properly using this Court's decision in *Jefferson Parish* to guide and inform its review of the evidence, is manifestly sound and does not require or warrant further review.

The arguments presented in support of the Petition, ignoring the record and the opinion of the court of appeals taken as a whole, cannot alter that fundamental analysis:

1. The Petition contends that "the Ninth Circuit has held that market power is irrelevant" and "has dispensed with market analysis." [Pet. at 11, 12] That contention distorts the opinion of the court of appeals. Market power, demonstrated by extensive market analysis (which the Petition ignores or misstates), was the focused subject of the trial and, necessarily, of the review of the trial on appeal.

That review correctly held, in accordance with *Jefferson Parish* and contrary to petitioner's contention, that (i) the market power in a tying product market need not be proven by proof of a high market share in the broadest possible market disregarding any submarket; and (ii) a sufficient impact on competition in the tied product market to justify per se condemnation of a tying arrangement may be

in which the case was presented to the court of appeals — the district court having in effect substituted its own findings for those of the jury, based on an artificial view of the marketplace contrary to the evidence.

shown by a forcing of the tied product on "an appreciable number of buyers," forcing them to buy "a substantial volume" of the products they would have preferred not to buy. [734 F.2d at 1341]

The Petition also suggests that the opinion of the court of appeals accorded too much weight to copyright and product distinctiveness as evidence of economic power. [Pet. at 6] However, the opinion is entirely in accord with the ruling of *Jefferson Parish* authorizing a finding of market power when "the seller offers a unique product that competitors are not able to offer." 104 S. Ct. at 1560–61.

2. The Petition claims that the decision of the court of appeals "affects the entire computer industry" since "[t]o the best of our knowledge, every manufacturer in the industry restricts the use of its operating systems to particular CPUs, with the exception of IBM." [Pet. at 9, 10 n.5] However, the record shows that other companies do not restrict use of their software to their hardware or charge both a license fee and an additional charge if a minimum equipment configuration is not purchased. The fact is that this is a *sui generis* case premised on a record of petitioner's singular misconduct.

Nor is the decision of the court of appeals in any way inconsistent with the decisions of other courts decided since *Jefferson Parish*. Other tying cases also have recognized the appropriateness of a jury's resolution as to the sufficiency of a defendant's economic power in one product market to restrain trade in another.

3. The Petition reargues petitioner's "business justification" arguments — irrelevant to the question it seeks to present to this Court — under the guise of depicting petitioner's tying arrangement as "pro-competitive." A new label, however, cannot cure the speciousness of petitioner's arguments. As held by the district court and the court of appeals, petitioner's tying arrangement is *not* required to provide a package of products to those customers who prefer a package; to recover the costs of software development; to prevent illegal copying; or to obtain a license fee for every

use of its software (whether on petitioner's machines or competing machines).

Petitioner cannot disguise its tying arrangement as anything other than what it was (and is), an anticompetitive device utilized to thwart competition — the only meaningful competition which might assist the many customers dependent on the use of petitioner's software.

Argument

I. THE DECISION BELOW FOLLOWS THIS COURT'S 1984 *JEFFERSON PARISH* DECISION AND IS CORRECT, MAKING FURTHER REVIEW UNNECESSARY AND INAPPROPRIATE.

A. *Market Power and Market Analysis*

The contention that the decision below held that market power is "irrelevant" and "dispensed with market analysis" [Pet. at 11, 12] is a fiction based on factual allegations that were disproved at trial. Illustratively:

> (a) The Petition claims that it is "an indisputable fact" that "DG cannot exploit its allegedly locked-in customers without driving them out of business." [Pet. at 18] As the court of appeals noted, the evidence in the case is to the contrary, supporting the jury's rejection of petitioner's entirely theoretical argument. [See 734 F.2d at 1346 (explaining that "[t]here are several answers" and referring to some of the evidence showing the insulation of petitioner's OEM customers from, and their relative insensitivity to, price competition)] Even if the evidence contrary to petitioner's factual contention were not so overwhelming, it at least was sufficient to warrant affirmance of the jury verdict. In asserting that "the district court's factual finding that 'lock-in' confers no power is dispositive" [Pet. at 19], it is petitioner, not the court of appeals, that is in error. Under the

> applicable standards of judicial review, it is not the district court's findings but the *jury's* findings which should be deemed "dispositive."
>
> (b) The Petition asserts that "DG does not possess [economic] power . . . because it sells to all customers at the same price, which must be a competitive price in order to attract new sales" [Pet. at 7], and that competition "saps DG of any power over price" [Pet. at 20]. The evidence, however, which petitioner did not even attempt to refute at trial, shows that petitioner has a considerable amount of discretionary power over price and that petitioner *did* forego sales to new customers in order to exploit its economic power to charge supra-competitive prices to old customers. See *supra* pp. 3-4[15] [*Cf.* 734 F.2d at 1343 (the special notation by the court of appeals of the testimony of petitioner's president that, "if required to forego the [MEC] program [petitioner] would have suffered a loss in revenues")]
>
> Moreover, the evidence shows that petitioner not only could but did discriminate against old customers both by explicit and implicit price discrimination. See *supra* pp. 3–5.[16]

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[15] The amicus curiae brief of the United States submitted to the court of appeals [Pet. App. E] states that "[n]ew sales would have to be sacrificed if locked-in customers were to be anticompetitively forced." [Pet. at 124a] The evidence shows that that is precisely what occurred, providing persuasive proof of economic power.

[16] Petitioner's economist witness as to market definition testified that if he knew of evidence that it was feasible for petitioner to discriminate against its old customers he "would give it great weight." [RT 6892-93] *Cf.* U.S. Dep't of Justice & FTC, *Merger Guidelines — 1982*, Trade Reg. Rep. (CCH) No. 546, at 18 (June 16, 1982) ("If . . . price discrimination is possible, the Department [of Justice] will consider de-

(c) The Petition asserts that petitioner's prices "'are in fact competitive.'" [Pet. at 7] However, the evidence is to the contrary. For example, the prices charged by petitioner for the peripheral devices included in its MEC designations are significantly higher than the prices charged by others for the same or equivalent items. Many of the items historically were purchased by petitioner from another company and merely resold to petitioner's customers; in 1979, for example, its mark-up for such resales averaged more than 250%. [RT 3529-30] Also, detailed price comparisons of combined hardware and software prices of petitioner and respondents showed that petitioner's prices were higher. [Exs. 2039, 1790; *cf.* Ex. 1261; RT 602-03, 605-07, 822-23, 1644-48, 2623, 2811]

(d) The Petition claims that "[t]he Ninth Circuit . . . could not have found that rivals' costs of designing an operating system for NOVA-instruction set CPUs would exceed DG's costs" and that "[n]o 'presumption' of power can survive the undisputed findings of the district court [on the point]." [Pet. at 16 n.11] However, the "findings" of the district court were not only disputed on the point, they were refuted by persuasive evidence showing the enormous cost advantage, as well as the time advantage, enjoyed by petitioner against any rival attempting to design a competing compatible operating system.

fining additional, narrower relevant product markets oriented to the buyer groups subject to the exercise of market power"); U.S. Dep't of Justice, *Merger Guidelines — 1984*, Trade Reg. Rep. (CCH) No. 655, at 37 (June 18, 1984) (same as to narrower relevant product markets "consisting of particular uses").

[*E.g.*, RT 352-53, 357-59, 377-83, 3712-14, 3893-97, 835, 4164, 2478; *cf.* RT 4645][17]

Thus, at bottom, petitioner's argument amounts to no more than a refusal to accept the jury's findings and the market analysis evidence presented at trial that petitioner could not refute. It does not constitute a valid criticism of the analysis of market power by the court of appeals[18] or in any sense provide a "special and important reason" within Sup. Ct. R. 17 for the granting of review by a writ of certiorari.

That conclusion is unaffected by petitioner's argument that "it is irrelevant that some customers are 'locked in'" [Pet. at 18] "[b]ecause customers knew when they bought DG's products that they would become locked in" [Pet. at 21]. As noted above, petitioner's factual assertions

[17] Petitioner's director of general products marketing expressed the view that, notwithstanding its status as one of the leading semiconductor companies, Fairchild would not have "the resources or capabilities in the foreseeable future to produce any appreciable software." [RT 2410]

[18] Petitioner particularly criticizes the statement of the court of appeals that "we review the record not for what it may reveal as to [petitioner's] position in a defined market in which [petitioner's] RDOS [the tying product] was sold, but only to determine whether the jury reasonably could have concluded [petitioner's] RDOS was sufficiently unique and desirable to an appreciable number of buyers to enable [petitioner] to force those buyers also to buy a substantial volume of [petitioner's] NOVA instruction set CPUs [the tied product] they would have preferred not to buy." [734 F.2d at 1341]

That statement of the issue presented on appeal is, however, entirely consistent with the emphasis in *Jefferson Parish* on "forcing" or "leverage" as the essence of market power. See 104 S. Ct. at 1559.

Moreover, it should be kept in mind that the opinion of the court of appeals explicitly took note of at least some of the evidence reviewed concerning the economic dependency of petitioner's customers on the continued availability of the tying product for their use ("lock-in"), petitioner's MEC practice and other evidence which confirmed that petitioner's economic power was — as the jury found — "the power to raise prices or . . . to impose burdensome terms that could not be obtained in a completely competitive market or submarket." [CR 3725, Ques. 7]

in that regard are contradicted by the record. Beyond that, petitioner's argument is intrinsically fallacious. Consumers do not require protection against a tie-in exploitation only at the time of a "first sale"; they may require such protection thereafter to an even greater extent. It was not an answer in *International Salt Co. v. United States,* 332 U.S. 392 (1947), or *International Business Machines Corp. v. United States,* 298 U.S. 131 (1936), or in any prior tie-in case, that the customers "freely chose" to purchase petitioner's tying product; to the contrary, economic power arising from the customers' commitment to the tying product was recognized as sufficient to condemn any attempted tying arrangement affecting sales of the tied product *after* the "first sale."

Finally, petitioner's principal complaint appears to be that the court of appeals' opinion did not require proof of economic power, and a generalized impact on competition, in broadly defined markets the same as would be required to show a monopoly and monopolization in a case brought under section 2 of the Sherman Antitrust Act (but disregarding proof as to any submarket). [*Cf.* Pet. at 20] But *Jefferson Parish* did not limit invalidation of tying arrangements only to those cases where the defendant was a proven monopolist acting illegally under section 2 of the Sherman Antitrust Act. Instead, in *Jefferson Parish* the Court defined economic power as the ability "to force a purchaser to do something that he would not do in a competitive market." 104 S. Ct. at 1559; see also *United States Steel Corp. v. Fortner Enterprises,* 429 U.S. 610, 620 (1977) *("Fortner II")* ("decisions do not require that the defendant have a monopoly or even a dominant position throughout the market for a tying product").

Nor is the Petition correct in criticizing the court of appeals for reviewing the jury finding of "an appreciable restraint within the tied product market or submarket" in terms of the economic power of petitioner to force its tied product on "an appreciable number of buyers" — forcing them to buy "a substantial volume of [petitioner's] . . . CPUs they would have preferred not to buy." [734 F.2d at 1341] That expression is not at all inconsistent with the

teaching of *Jefferson Parish* that "there must be a substantial potential for impact on competition in order to justify per se condemnation" — not, as petitioner inferentially claims, a foreclosure of all competition in the broadest possible market. 104 S. Ct. at 1560; *see also Fortner II,* 429 U.S. at 614 ("we have already held that the dollar value of the sales to respondent was sufficient to meet the 'not insubstantial' test described in earlier cases").

Thus, overall, the court of appeals was correct in holding that the evidence in this case is sufficient (and more than sufficient) to meet the tests of per se illegality set forth in *Jefferson Parish,* making a review of the decision by this Court unnecessary and inappropriate.

B. *Copyright and Product Distinctiveness*

The contention that the decision of the court of appeals affirmed the jury verdict because "RDOS is copyrighted . . . and . . . uniquely attractive to *some* of DG's customers," without regard to whether or not the facts related to petitioner's market power [Pet. at 8], is also a distortion of the opinion.

As to copyright, the court of appeals: (i) ruled that the district court erred in refusing to give any weight to petitioner's aggressive use of copyright and trade secret claims on the ground that a computer program written in source code was not copyrightable; and (ii) pointed out that, apart from the wealth of evidence presented supporting respondents' position, respondents at least were entitled to a presumption of economic power, shifting the burden of proof, as a result of the barriers created by petitioner's copyrights to duplication of petitioner's distinctive product. The court's ruling and its comment follow established case law and are correct.

The references in the opinion of the court of appeals to a presumption of economic power flowing from a copyright should be understood in the context of the erroneous argument of petitioner, of which it persuaded the district

court, that computer software written in source code was not copyrightable.[19]

That error led the district court to totally disregard the telling evidence presented by respondents (virtually unchallenged by any evidence offered by petitioner) demonstrating the significant barriers to the development of competing software created by petitioner's aggressive use of its copyright and trade secret claims. That was an error which required correction; and, in correcting the district court, it was appropriate for the court of appeals to note that respondents were deprived not only of the benefit of the evidence presented on the point but also of a presumption shifting the burden of proof to petitioner.

The invocation of such a presumption is in accord with the rulings of this Court[20] and is a sensible allocation of the burden of proof. If, as petitioner now claims, the legal barriers it utilized did not create, or assist in creating, economic power, it would have been a simple matter for petitioner to so prove. It is reasonable to suppose that petitioner did not even try because it in fact had used its copyright and tandem trade secret claims as part of a studied campaign of aggression to thwart competition.[21]

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[19] Compare the district court decision, *In re Data General Corp. Antitrust Litigation*, 529 F. Supp. 801, 816 (N.D. Cal. 1981), referring to its ruling at 490 F. Supp. at 1113 (citing the discredited decision of *Data Cash Systems v. JS&A Group*, 480 F. Supp. 1063 (N.D. Ill. 1979), *aff'd*, 628 F.2d 1038 (7th Cir. 1980)), with the decision of the court of appeals [734 F.2d at 1344 n.5] citing the later decisions holding operating system software written in either source code or object code to be copyrightable, *Apple Computer, Inc. v. Formula International Inc.*, 725 F.2d 521 (9th Cir. 1984), and *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983), *cert. dismissed*, 104 S. Ct. 690 (1984).

[20] See *United States v. Loew's Inc.*, 371 U.S. 38 (1962), and *United States v. Paramount Pictures*, 334 U.S. 131 (1948), both cited in *Jefferson Parish*, 104 S. Ct. at 1560-61.

[21] The amicus curiae brief proffered on behalf of Control Data Corp. ("CDC") claims (at 4) that the court of appeals created an "irrebuttable presumption" by assuming "that the U.S. copyright law provides an equivalent degree of economic power to that provided by the United States patent laws." That claim is patently wrong. There is nothing in

Petitioner's complaint concerning the references in the opinion of the court of appeals to product distinctiveness is equally without merit. Contrary to the implication of petitioner's argument, this is not a case involving merely a product "a little different" from competing products. Instead, it is a classic case of demonstrated economic power resulting from possession of a product so unique and so necessary to 80% of all of petitioner's customers, and so protected by natural and artificial barriers to duplication, that significant economic power to raise prices or impose burdensome terms was created (and in fact was exercised). Properly instructed, it was within the province of the jury so to find by its verdict; and it thus became within the province of the court of appeals to order that verdict to be reinstated.

The decision below cannot properly be viewed apart from its procedural context and the facts of this case abundantly demonstrating petitioner's economic power precisely in accordance with the test approved in *Jefferson Parish*.[22] Viewed in that context, this is not a case which calls for review by this Court.[23]

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the decision of the court of appeals that even remotely suggests that a copyright gives rise to an irrebuttable presumption of economic power. The relevant jury finding was based on instructions, implicitly approved by the court of appeals, directly contrary to CDC's argument. An excerpt from the relevant instructions by the district court to the jury is set forth in the Appendix hereto.

Nor can it be maintained that a presumption of economic power flowing from copyright is impossible to rebut. *Cf. Apple Computer, Inc. v. Formula International Inc.*, 725 F.2d 521, 525 (9th Cir. 1984) ("Apple introduced evidence that numerous methods exist for writing the programs involved here").

[22] See *Jefferson Parish*, 104 S. Ct. at 1560-61 ("when the seller offers a unique product that competitors are not able to offer, see *Fortner* [*Enterprises v. United States Steel Corp.*, 394 U.S. 495, 504-06 & n.2 (1969)], the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make per se condemnation appropriate"); see also *Fortner II*, 429 U.S. at 621 n.14.

[23] The amicus curiae brief proffered on behalf of Mercedes-Benz

II. THE DECISION BELOW, AFFIRMING JURY FINDINGS PREMISED ON THE RECORD OF PETITIONER'S SINGULAR MISCONDUCT, DOES NOT EXPAND TRADITIONAL TYING LAW OR THREATEN THE NORMAL BUSINESS CONDUCT OF OTHERS IN ANY WAY.

Petitioner's arguments that the decision below "affects the entire computer industry" depends on its assertion that "every manufacturer in the industry restricts the use of its operating systems to particular CPUs, with the exception of IBM." [Pet. at 9, 10 n.5]

But respondents have never challenged (and, indeed, themselves approve of) the industry practice of restricting "the use of . . . operating systems to particular CPUs." [Pet. at 10 n.5] What is complained of in this case and was ruled on below is petitioner's practice of refusing to license its software for use with any CPU other than one manufactured by petitioner. The record indicates that other companies do not restrict use of their software to their hardware.[24] Indeed, petitioner's president conceded that he did not know of any company that uses a contractual restriction prohibiting the use of licensed software on a competing CPU. [RT 4499]

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notes that the United States took a position on the merits leading to dismissal of the complaint in the case of *United States v. Mercedes-Benz of North America, Inc.*, No. C-79-2144-MHP (N.D. Cal., March 15, 1982). It is noteworthy that, in contrast, the brief submitted by the United States to the court of appeals in this case took no position on whether petitioner had violated the Sherman Antitrust Act. [See Mercedes-Benz Br., at 14; Pet. at 117a]

[24] CR 1656 (Depo. of Roger S. Borovoy, Sept. 13, 1979, pp.100-03) (reporting results of a survey of at least eight major vendors of hardware and software); see also 490 F. Supp. at 1105 & n.21. It has been assumed by many in the industry that practices such as those employed by petitioner are illegal. Thus, a Computer Products Competitive Information Bulletin of one company warned that a software license agreement which "require[d] the lessee to use only [the licensor's] hardware, would violate the anti-trust laws." [CR 1656, Ex.64]

And he admitted that petitioner is the only company known to force upon customers a minimum equipment configuration of hardware products. [RT 4494-95]

Petitioner's claim that "[t]his case affects all markets" since "under the holding of this case, if a firm makes a better mousetrap then it cannot use the practice . . . of selling hardware and software together" [Pet. at 10] is even more overreaching and misguided. Nothing in the opinion of the court of appeals (or in any pleading by respondents) even remotely suggests that a manufacturer — even one with economic power inhering in one product — might be precluded from offering separate products together as well as separately. Petitioner's argument is especially irrelevant since the tie employed by petitioner in this case does not even involve "packaging" in the customary sense [*cf.* RT 3694-95 (the MEC does not constitute a package deal)]: Petitioner sells or licenses its separate products separately, *un*packaged, but uses its tying product (software) to force sales of unwanted hardware.

The suggestion that the decision of the court of appeals might influence other lower courts to adopt some over-expansive reading of *Jefferson Parish* is equally far-fetched. There is nothing which has appeared in any decision to demonstrate any such tendency.[25]

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[25] The motion for leave to file brief amicus curiae on behalf of Mercedes-Benz suggests (at 4) that *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 5 Trade Reg. Rep. (CCH) (1984-2 Trade Cas.) ¶ 66,225 (N.D. Cal. 1984), "is the first and only district court opinion addressing both the decision of the court of appeals below, and *Jefferson Parish*" and that the district court was "unsuccessful" in "reconcil[ing] the two cases." But that is incorrect. The district court in the *Mozart* case found not the slightest inconsistency between *Jefferson Parish* and the decision of the court of appeals. Indeed, in the passage of the opinion most relevant to petitioner's argument, the district court explicitly states:

> "*Hyde* thus makes no change in the law concerning the use of a per se standard in tying cases. The three-part test articulated by this court in *MBNA* continues to have validity. See *Digidyne Corp. v. Data General Corp.* [1984-1 Trade Cases ¶ 66,053], 734 F.2d 1336, 1338 (9th Cir. 1984)."

1984-2 Trade Cas. at 66,936-37.

The fact is that this is a *sui generis* case presenting a record of nonpareil scope and strength, compelling condemnation of petitioner's singular conduct.[26] Contrary to petitioner's main argument, if the present case does not prove a per se tying violation, then probably no such case can ever be proven (except perhaps against a proven monopolist in the broadest possible market).

Furthermore, if petitioner's practices were condoned, that would invite others to follow petitioner's lead.[27] The result would be that where, as in this case, a complex dominant operating system is needed and cannot be timely duplicated, competition by emulators would be eliminated. The evidence in this case indicates that competition from emulators has been an important engine of progress in the computer industry. [RT 3535, 3538, 3690, 3293-94, 3303, 3347-48, 717-18] To sacrifice such competition and its attendant benefits notwithstanding the record in this case, as petitioner urges, would make a mockery of existing law and promote an unsound policy of raising new barriers to meaningful competition. Nothing in *Jefferson Parish* either requires or warrants such a baneful result.

Indeed, contrary to the argument made in support of the Petition, the decision below is consistent not only with *Jefferson Parish* but also with the other lower court decisions decided since *Jefferson Parish*. Of particular note is that the cases have consistently honored jury verdicts.

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[26] Compare the complete record in this case with the relatively barren record as to any kind of market power in *Jefferson Parish*. In *Jefferson Parish*, it was particularly noted that "this record contains no evidence that the hospital 'forced' any such services" [104 S. Ct. at 1567] and that the challenged arrangement "does not have the obviously unreasonable impact on purchasers that has characterized the tying arrangements that this Court has branded unlawful" [*id.* at 1568].

[27] The motion for leave to file a brief for other computer companies strongly suggests that, if the decision below were reversed, the industry standard of antitrust compliance would quickly degenerate to the lowest possible denominator represented by petitioner's conduct.

Cf. Konik v. Champlain Valley Physicians Hospital Medical Center, 733 F.2d 1007, 1017 (2d Cir.) ("it is clear that at least a jury question was presented as to whether the Hospital had sufficient economic power in the market for hospital operating facilities to enable it to restrain trade in the market for anesthesiology services"), *cert. denied,* 105 S. Ct. 253 (1984); *Spartan Grain & Mill Co. v. Ayers,* 735 F.2d 1284, 1289 (11th Cir. 1984) (tying claim dismissed on the basis of a jury finding that the defendant did not have any cost advantage over others in providing the tying product (a guaranteed price for the purchase of hatchery eggs), explaining: "That the jury answered this interrogatory in Spartan's favor resolves the question of Spartan's economic power"). See also *Graphic Products Distributors, Inc. v. Itek Corp.,* 717 F.2d 1560, 1566 (11th Cir. 1983), a rule of reason case challenging a dual distribution system, where the court affirmed a jury verdict for the former distributor, emphasizing the limited function of the court in ruling on a judgment *n.o.v.* and "the limited character" of appellate review.[28]

An argument also is presented in support of the Petition that essentially treats this case as if it involved an ordinary manufacturer or franchisor vertical restraint designed to regulate the resale activities of an appointed

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[28] The only other tying case cited in support of the Petition which related to proof of market power was *Systemized, Inc. v. SCM, Inc.*, 732 F.2d 1030, 1035 (1st Cir. 1984). In that case, the decision was dictated by the fact that no tying arrangement was found. However, the court added that the plaintiff had failed to prove market power in the tying product (major accounts with large copying needs). In *Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1285 (11th Cir.), *cert. denied*, 459 U.S. 857 (1982), the complaint was dismissed for lack of "any evidence of actual injury" caused by the alleged tie. *Jack Walters & Sons v. Morton Building, Inc.*, 737 F.2d 698 (7th Cir.), *cert. denied*, 53 U.S.L.W. 3365 (U.S. Nov. 13, 1984), held that separate products were not there involved. *Columbia Broadcasting System v. American Society of Composers, Authors & Publishers*, 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981), merely held that the blanket license of music performance rights to a repertoire of musical compositions was not an unreasonable restraint of trade where the plaintiff did not prove that the purchase of performance rights to individual songs was not fully available.

dealer or franchisee. Petitioner should not be allowed thus to avoid the fact that this is a tying case not involving any dealer or franchisee regulation and that tying arrangements such as that employed by petitioner are entirely different in their function and competitive consequences from the usual dealer or franchisor vertical restraint.

As well illustrated in this case, tying arrangements have a special potential for acting as a significant barrier to the entry of effective competition — exploiting economic advantage in a tying product to exclude competition on the merits in respect of the tied product. They are subject to adjudication under both section 1 of the Sherman Antitrust Act and section 3 of the Clayton Act, which reflects the long-held view that tying arrangements often have a "pernicious effect on competition." *Northern Pacific Railway v. United States*, 356 U.S. 1, 5 (1958).[29]

What petitioner's argument suggests is not that *Jefferson Parish* should be followed but that *Jefferson Parish*

[29] The Petition suggests that section 3 of the Clayton Act has no application here because the tying product is not a "good[]"or a "commodit[y]." [Pet. at 8 n.4] However, the cases hold that section 3 of the Clayton Act applies to "tangible products" [*Baum v. Investors Diversified Services*, 409 F.2d 872, 875 (7th Cir. 1969)], and that, for various purposes, computer software is a "tangible product." See *Texas Instruments Inc. v. United States*, 551 F.2d 599, 611 (5th Cir. 1977) (software tangible personal property for investment tax credit); *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 457 F. Supp. 765, 769 (E.D.N.Y. 1978) (software "more readily characterized as 'goods' than 'services'" within the meaning of the Uniform Commercial Code), *aff'd in relevant part*, 604 F.2d 737, 742-43 (2d Cir. 1979); *F.&M. Schaefer Corp. v. Electronic Data Systems*, 430 F. Supp. 988, 993 (S.D.N.Y. 1977) (software subject to replevin), *aff'd mem.*, 614 F.2d 1286 (2d Cir. 1979); *Greyhound Computer Corp. v. State Department of Assessments & Taxation*, 271 Md. 674, 320 A.2d 52, 57 (1974) (software tangible item for the purpose of property tax); *Hancock v. State*, 402 S.W.2d 906, 908 (Tex. Crim. App. 1966) (software held to be "property" subject to theft and evaluated in accordance with the value of the programs involved).

Ambook Enterprises v. Time Inc., 612 F.2d 604, 609-10 (2d Cir. 1979), *cert. dismissed*, 448 U.S. 914 (1980), cited by petitioner, held only that newspaper advertising was not a "commodity" under the Robinson-Patman Act.

and all of the prior cases treating tying arrangements as suspect should be reversed. The record here presented provides no occasion for such a drastic repeal of the present law.

III. PETITIONER'S ARGUMENT THAT ITS TYING ARRANGEMENT MAY BE PRO-COMPETITIVE MERELY ATTEMPTS TO RESUSCITATE ITS DISCREDITED BUSINESS JUSTIFICATION DEFENSE AND IS UNDESERVING OF FURTHER REVIEW.

Petitioner's "business justification" arguments, rejected below [490 F. Supp. at 1120-23, *aff'd*, 734 F.2d at 1343-44] and presented here under a different guise (to show that petitioner's tying arrangement is "pro-competitive") are irrelevant to the question petitioner seeks to present.

Even if the arguments are considered on their merits, however, they remain specious.

Petitioner's own statements illustrate the inherent fallacy of petitioner's first argument that its tie may increase consumer choices. Petitioner, while contending that "[s]ome customers welcome the availability of packages assembled by producers," concedes that "[o]ther customers, though, want the advantage of selecting each component separately." [Pet. at 13] The Petition admits that "[c]ompetition . . . is rigorous" where "[c]onsumers can shop for CPUs from one vendor, software from another vendor, and other equipment from a third vendor." [*Id.*][30] The Petition attempts to avoid that teaching by suggesting that

[30] Mixed computer installations with hardware and software from different vendors are common and increasingly preferred by many users. [RT 1753-55] Thus, petitioner utilizes in its own business an emulator CPU manufactured by Amdahl Corporation with IBM operating system software. [RT 4480-81, 4704]

Furthermore, petitioner itself has licensed its software for use with CPUs manufactured by a competing manufacturer for sale in Japan and by a manufacturer of "ruggedized" CPUs for military and similar use. [CR 343, Cit. II-A, Tabs 7, 8; RT 4720-21] In addition, in connection with

"the nature of competition in the data processing business is that manufacturers design systems." [*Id.*] However, the argument falls of its own weight when it is appreciated that, in this case, the proof is that the relevant systems are designed by OEMs, not by petitioner. Moreover, more than 80% of petitioner's OEM customers not only desire but also need to have the freedom which the Petition hails to acquire "CPUs from one vendor [and] software from another vendor" in order to have "competition at work." [*Id.*] In light of the record in this case, it should not avail petitioner to portray itself as "like Apple" or to divert attention to other hypothetical cases. On the basis of *this* record, petitioner cannot escape the jury's finding that its tying arrangement is, in effect, purposefully and ineluctably anticompetitive.

Petitioner's argument for a "second competitive benefit" is equally false. [Pet. at 15] There is no reason whatever (and certainly none is suggested by any evidence of record) why petitioner cannot recover its software development costs from its software license fees without additional charges. [See 734 F.2d at 1343-44, *aff'g*, 490 F. Supp. at 1122] There is likewise no evidence that petitioner's tying arrangement is needed to prevent illegal copying or monitor per machine use (or even has any relationship to those objectives). The proof that others successfully license software separately on a per machine basis confirms that petitioner's argument is totally devoid of merit.

Petitioner's arguments were considered by the district court after a full opportunity accorded to petitioner to undertake massive discovery and to present to the court all evidence gained through that discovery as well as extensive

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a large purchase of equipment by Control Data Corporation ("CDC"), petitioner gave a conditional license to CDC to use petitioner's software on CPUs manufactured by others (the condition being that petitioner's CPUs became "totally noncompetitive"). [Ex. 19; RT 3533-34]

affidavits.[31] There is no good reason to in effect reopen the case to have petitioner's discredited arguments considered again.[32]

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[31] In all, petitioner had the benefit of 475 days of depositions noticed by petitioner and many thousands of pages of documents produced by respondents, other parties who sued petitioner and many third parties.

Petitioner also has had the benefit of consideration by the district court of a motion for a new trial based on supposed "newly discovered" evidence, which motion was denied. [CR 3762; RT 7976]

[32] See *Wheatley v. Beetar*, 637 F.2d 863, 867 (2d Cir. 1980) (holding that, where the defendant "'has had a fair trial on the issue of liability . . . it would be . . . grossly unfair to plaintiff, as well as contrary to the spirit of [Fed. R. Civ. P. 59], to require a retrial of the question of defendant's culpability which has already been decided by the jury in plaintiff's favor'").

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

December 14, 1984

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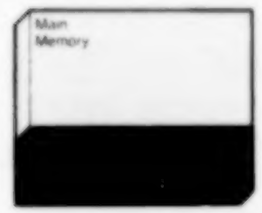
APPENDIX

Exhibit 1749

· GLOSSARY ·

Term	*Definition*
HARDWARE	
Computer	The machine in a computer system consisting of (a) an arithmetic and logic unit (to do computations and process information (data)), (b) a control unit (to control the operations of the machine according to the instructions provided to it) and (c) the memory boards in the same box (known as the "main memory") for the storage of instructions and the data to be processed.



Computer

Term | *Definition*

Central Processing Unit (CPU)

CPU

The arithmetic and logic unit and the control unit of a computer, both designed to operate with a particular instruction set.

- **CPU Emulation** — Design of a CPU which utilizes the same instruction set as another CPU and which therefore may be substituted for the first machine.

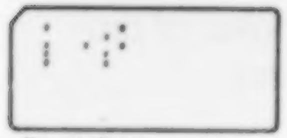
- **Instruction Set** — A listing of the instructions (commands) which a particular CPU is capable of executing, in effect defining the vocabulary of the computer.

Term | *Definition*

Peripheral Devices (Input/Output Machines)

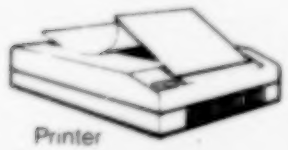
The machines which:

Terminal



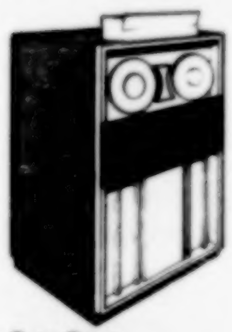
Punch Card

(a) deliver instructions and information (data) to the CPU in machine readable form;



Printer

(b) receive information from the CPU and report it in human readable form (output devices); and



Tape Drive

Disk Pack

(c) store instructions and data for future use (storage or memory devices).

Term	Definition
SOFTWARE	
Computer Programs  Computer Printout	Sequenced instructions to the computer encoded on disks, punched cards or other media or in main memory (in machine language) and the program documentation therefore (manuals, books, or program printouts).
System Software	Software that controls and operates the computer system rather than performing any particular user's task.
• **Operating System**	Programs which provide the basic instructions for operation, control and management of the computer system.

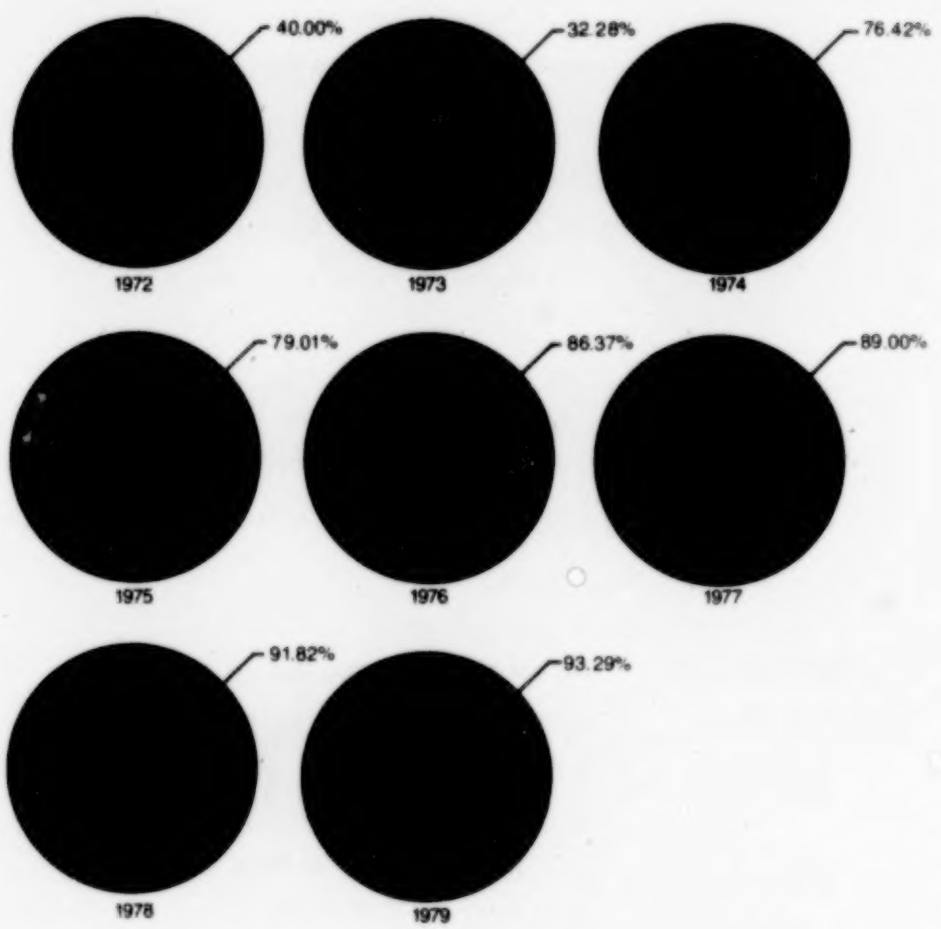
Term	Definition
• **Language Processors (Translators called Assemblers, Compilers and Interpreters)**	(a) Programs called ASSEMBLERS or COMPILERS that direct the translation of human language instructions (source code) into machine language instructions (object code) or (b) programs called INTERPRETERS that translate and execute each source language instruction before translating and executing the next one.
• **Utilities**	Programs which direct the execution of common data processing tasks (such as copying data from card to disk, the loading of programs or the sorting of data).

Term	Definition
Application Software	Programs designed to accomplish a user's specific data processing tasks.
Computer Language	A collection of symbols used to provide instructions to a computer.
• **Machine Language**	Patterns of on/off electrical impulses (represented by strings of 0's or 1's) which a computer can "read" through its particular instruction set.
• **Assembly Language**	A human readable language with alphanumeric symbols (letters and numbers) to represent the machine language of a particular computer, assisting the user in writing instructions to the computer.

Term	Definition
• **High Level Languages**	Human readable languages in which a single statement is translated by a compiler into many machine language instructions, requiring a translation. Examples: BASIC, FORTRAN, COBOL, ALGOL, PASCAL.
Compatible Software	Software products that are interchangeable without modification.
COMPUTER SYSTEM	All of the hardware and system software which are utilized together and any application software programs which may be running at the time.

NOVA Sales to Old Customers

By CPU's Sold



Old Customers
New Customers

Old Customer:
Any customer who orders a CPU after the date of its **Initial Order** from Data General.

Businesses with multiple billing addresses are considered one customer.

Exhibit 3011 f

Excerpts From the Instructions of the District Court to the Jury on the Subject of Copyright as a Potential Legal Barrier Preventing a Competitor From Offering a Distinctive Product

"A copyright is a legal right to prevent others from making copies of an original work of authorship . . . ."

* * *

"Copyright law only prohibits copying. The law imposes no prohibition upon those who, without copying, independently arrive at the precise combination of words or notes which may have been copyrighted. Also, copyright laws only prohibit the copying of the author's form of expression in setting forth an idea. It does not prohibit the copying of the idea itself.

"In computer programming, the expression, which would be the lines of code adopted by the programmer that have been displayed in court, is the copyrighted element in a computer program. The actual processes or methods which are embodied in the program, however, are not within the scope of the copyright law. And thus, if a second programmer uses the processes or methods of the copyrighted program in a different original expression to make the CPU do the same thing as it would if the copyright work was inserted, there would be no infringement."

* * *

"Copyright protection is presumed by itself to prevent others from offering the distinctive products themselves . . . . You, as the triers of the fact, must take note of material facts in the record which may rebut the presumption. And such presumption is rebutted if the defendant has shown by a preponderance of the evidence that the copyright on its software has not prevented others from offering the distinctive products themselves, so that the defendant does not have some advantage not shared by its competitors."

[RT 7609-12]

Certificate of Service

The undersigned counsel of record for Respondents certifies that he is a member of the Bar of this Court and that, on December 14, 1984, three copies of the Brief for Respondent in Opposition to Petition for a Writ of Certiorari were served upon counsel for Petitioner by first-class mail, postage prepaid in Phoenix, Arizona, addressed as follows:

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